

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Azcon Corporation :  
As Successor in Interest of Unimet Corp. : AFFIDAVIT OF MAILING  
:  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Corporation :  
Franchise Tax under Article 9A of the Tax Law for :  
the Year 1972. :

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State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 6th day of July, 1984, he served the within notice of Decision by certified mail upon Azcon Corporation, As Successor in Interest of Unimet Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Azcon Corporation  
As Successor in Interest of Unimet Corp.  
230 Park Avenue  
32nd Floor  
New York, NY 10169

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
6th day of July, 1984.

David Parchuck

James A. Harnes  
Authorized to administer oaths  
pursuant to Tax Law section 174

## STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Azcon Corporation :  
As Successor in Interest of Unimet Corp. :  
AFFIDAVIT OF MAILING :  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Corporation :  
Franchise Tax under Article 9A of the Tax Law for :  
the Year 1972. :

State of New York }  
County of Albany } ss.:

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 6th day of July, 1984, he served the within notice of Decision by certified mail upon Edward M. Virshup, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Edward M. Virshup  
c/o Azcon Corp.  
230 Park Ave., 32nd Fl.  
New York, NY 10169

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
6th day of July, 1984.

David Partridge

*Donna R. Hughes*  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

July 6, 1984

Azcon Corporation  
As Successor in Interest of Unimet Corp.  
230 Park Avenue  
32nd Floor  
New York, NY 10169

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Law Bureau - Litigation Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Edward M. Virshup  
c/o Azcon Corp.  
230 Park Ave., 32nd Fl.  
New York, NY 10169  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
AZCON CORPORATION	:	DECISION
As Successor in Interest of	:	
UNIMET CORPORATION	:	
for Redetermination of a Deficiency or for	:	
Refund of Franchise Tax on Business Corporations	:	
under Article 9-A of the Tax Law for the Year	:	
1972.	:	

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Petitioner, Azcon Corporation, as successor in interest of Unimet Corporation, 230 Park Avenue, New York, New York 10017, filed a petition for redetermination of a deficiency or for refund of franchise tax on business corporations under Article 9-A of the Tax Law for the year 1972 (File No. 25002).

A formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 19, 1982 at 9:15 A.M. Petitioner appeared by Edward M. Virshup, Assistant Treasurer. The Audit Division appeared by Paul B. Coburn, Esq. (William Fox, Esq., of counsel).

ISSUES

- I. Whether the Audit Division properly disallowed a portion of Unimet Corporation's interest expense as directly attributable to subsidiary capital.
- II. If so, whether management fees received by Unimet Corporation from its wholly-owned subsidiaries should be excluded from entire net income as income from subsidiary capital.

FINDINGS OF FACT

1. On February 17, 1976, the Audit Division issued to Unimet Corporation ("Unimet") a Notice of Deficiency, asserting additional franchise tax due under

Article 9-A of the Tax Law for the year 1972 in the amount of \$9,464.86, plus interest thereon. The Statement of Audit Adjustment, issued to Unimet on August 21, 1975, set forth two bases for the tax asserted: (1) disallowance of interest expense indirectly attributable to subsidiary capital; and (2) disallowance of a New York net operating loss deduction.

On or about May 11, 1976, Azcon Corporation ("Azcon"), as successor in interest of Unimet, filed a petition for redetermination of the portion of the deficiency which had disallowed Unimet's interest deduction in part.

2. Unimet was a holding company. The greatest portion of its income for 1972 (\$445,737.00 of a total of \$446,215.00) consisted of management fees paid by its three wholly-owned subsidiaries, Stainless Shapes, Inc., Gilbert Merrill Steel Corp. and Rich Steel Company.

3. On its federal corporation income tax return for the year under consideration, Unimet deducted interest expenses of \$185,012.00. Statement 2, appended to the federal return, disclosed the following amounts of investments in and advances to subsidiaries:

	<u>1/1/72</u>	<u>12/31/72</u>
Investments in subsidiaries	\$3,495,886	\$8,090,855
Advances to subsidiaries	290,714	(619,685)

In calculating its New York entire net income for 1972, Unimet did not subtract from its federal taxable income any amount of interest, dividends or capital gains from subsidiary capital (Schedule B, line 7); nor did Unimet increase federal taxable income by any deductions attributable to subsidiary capital (Schedule B, line 4).

4. On or about October 7, 1977, Azcon submitted to the Audit Division the following analysis of Unimet's liabilities outstanding as of December 31, 1972:

9 percent note (general purposes)	\$ 200,000
9½ percent notes (Gilbert Merrill Steel Corp. acquisition, refinancing)	
Investors Syndicate of America, Inc.	1,500,000
Investors Syndicate Life Insurance and Annuity Company	500,000
Guarantee Mutual Life Company	500,000
Board of Pensions, Lutheran Church	500,000
Non-interest bearing notes	77,471
	<u>\$3,277,471</u>

Thereafter, on October 17, 1977, the Audit Division revised the deficiency asserted against Unimet, attributing \$3,000,000.00 of the outstanding liabilities and a proportionate part of the interest expense directly to subsidiary capital.

Refinancing of subsidiary	\$3,000,000	
Total outstanding debts	<u>\$3,277,471</u>	= 92%

Total interest expense of \$185,012 at 92% = \$170,211

Federal taxable income before special deductions	(\$ 77,758.00)
Interest expense directly attributable to subsidiary capital	170,211.00
New York franchise tax	384.00
Entire net income	<u>\$ 92,837.00</u>
Tax at 9 percent	8,355.33
Tax per report	125.00
(Revised) deficiency	<u>\$ 8,230.33</u>

#### CONCLUSIONS OF LAW

A. That section 208, subdivision 9 furnishes the definition for and method of computing entire net income; paragraph (a), subparagraph (1) thereof provides that entire net income shall not include "income, gains and losses from subsidiary capital...". Paragraph (b) sets forth those exclusions, deductions and credits which are not permitted in the determination of entire net income and provides, in pertinent part:

"Entire net income shall be determined without the exclusion, deduction or credit of:

\* \* \*

(6) in the discretion of the tax commission, any amount of interest directly or indirectly and any other amount directly attributable as a carrying charge or otherwise to subsidiary capital or to income, gains or losses from subsidiary capital."

The regulation in force for years prior to 1976 addressed the above two provisions as follows:

"After determining Federal taxable income, it must be adjusted as follows:

\* \* \*

Deduct from Federal taxable income:

(8) All dividends, interest and gains from subsidiary capital... which were taken into account in computing Federal taxable income (less, in the discretion of the State Tax Commission, any deductions allowed in computing Federal taxable income for (1) interest which was directly or indirectly attributable, and (2) any other amounts which were directly attributable, as a carrying charge or otherwise, to subsidiary capital or to income and gains therefrom), but not any other income from subsidiaries...". Former 20 NYCRR 3.11(b).

B. That the Commission does not choose to exercise the discretion accorded to it under Tax Law section 208.9(b)(6) to allow petitioner a deduction for the amount of interest indirectly attributed to subsidiary capital. The taxpayer's exclusion of income from subsidiary capital is not a prerequisite to the disallowance, in the same taxable year, of the interest deduction. To conclude otherwise would allow taxpayers, via the appropriate timing of distributions to parent corporations from subsidiaries, to avoid taxation on such distributions, while at the same time taking advantage of the interest deduction.

C. That petitioner has not shown that the management fees received from its subsidiaries were received other than in the ordinary course of its business; consequently, petitioner properly included such fees in its entire net income.

D. That the petition of Azcon Corporation, as successor in interest of Unimet Corporation, is hereby denied, and the Notice of Deficiency issued on February 17, 1976 and revised on October 17, 1977 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 06 1984

*Richard A. Cline*  
PRESIDENT

*Francis Q. Koenig*  
COMMISSIONER

*Mark J. J. J. J.*  
COMMISSIONER